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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Review of the Commission's	) MM Docket No. 95-92
Regulations Governing Programming	)
Practices of Broadcast Television	)
Networks and Affiliates	)

To the Commission:

JOINT COMMENTS

COSMOS BROADCASTING CORPORATION
COX BROADCASTING, INC.
FIRST MEDIA TELEVISION, L.P.
GUY GANNETT COMUNICATIONS
RIVER CITY BROADCASTING, L.P.

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SUMMARY OF COMMENTS

The network rules at issue in this proceeding derive from the Commission's 1941 Chain Broadcasting Report. The networks' power vis a vis their affiliates which initially prompted those rules remains unchanged -- and, if anything, has been enhanced -- by the recent revolution in the video marketplace. Networks continue to demand -- and to obtain -- contract concessions which substantially inhibit licensees' unrestricted ability to make independent programming and scheduling decisions. Affiliates continue to accept restrictive network contract provisions because they cannot afford to offend their networks.

Networks' relationship with their affiliates has changed from one of mutual cooperation to one in which the networks are aggressive and even hostile in dealing with individual stations. Recent and proposed changes in other network rules will materially enhance networks' bargaining leverage over affiliates, and exacerbate their ability to extract concessions from local stations. If licensees are to retain their statutorily-mandated control over station operations, the network rules must remain in place.

Right to Reject Rule. Unbroken, consistent Commission precedent emphasizes the paramount importance of unfettered licensee control over station operations and programming. Yet networks now insist upon contract provisions which force affiliates to cede practical control over programming and scheduling matters to the networks, pushing the limits of the Right to Reject Rule. That rule's retention is critical to preservation of the remnants of licensees' ability to make independent programming and scheduling decisions which optimize local service. There should be no doubt that if the rule is weakened, the networks will exploit that change to the detriment of locally oriented service.

Recent network contract demands reflect the networks' increasing ability to force stations to carry network programming without regard to licensees' independent determinations that other programming may be more suitable to their audiences. Excessive contractual limitations on preemptions and required clearance levels are inconsistent with the principles which underlie the Right to Reject Rule. Yet the networks insistent on such provisions, even in the face of affiliates' strenuous objections. The networks' "take it or leave it" attitude is restrained only by the Right to Reject Rule. If that rule is modified or eliminated, networks' demands will escalate, and the networks' control over affiliates' programming will, in practice, approach totality.

The rule's modification to permit networks to restrict "economic" preemptions would not only conflict with its original purposes: it would make a mockery of the principles of licensee programming control. Nothing in the statute or Commission case precedent suggests that licensees' right -- and obligation -- to control their programming does not extend to decisions based on economic considerations. To the contrary, licensees are held responsible for, and thus must have the independent ability to control, all aspects of station operation. They must not be forced to relinquish control over any aspect of that operation to the networks.

Time Optioning. Network time optioning also permits networks to exert control over affiliates' operations which is inconsistent with licensees' statutory obligations. It is no less offensive to principles of licensee accountability now than it was in 1941. The suggestion that time optioning's defects could be cured by adding a notice provision begs the question: it would simply extend the period over which networks could control station operations.

Exclusive Affiliation. The Commission should retain the current prohibition on exclusive network affiliation, as its elimination would simply enhance networks' already excessive bargaining power.

Dual Networks. The Commission should continue to restrict national networks to operation of a single network.

Territorial Exclusivity. The Commission should at least recognize a 35-mile zone as a reasonable geographic zone for network territorial exclusivity.

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To the Commission:

JOINT COMMENTS

Cosmos Broadcasting Corporation, Cox Broadcasting, Inc., First Media Television, L.P., Guy Gannett Communications and River City Broadcasting, L.P.["Joint Parties"], by their attorneys, submit herewith their Joint Comments in response to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding.[1/] The Joint Parties are the licensees or parents of the licensees of network-affiliated television stations, and therefore have substantial experience in network-affiliate relationships as well as a significant interest in the outcome of this proceeding.

1/ Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, Notice of Proposed Rule Making, MM Docket No. 95-92, FCC 95-254 (June 15, 1994) ["Notice"].

Introduction

The rules at issue in this proceeding[2/] derive from the Commission's 1941 Chain Broadcasting Report.[3/] There, the Commission recited evidence of numerous "abuses" by the networks in their relationships with affiliates and concluded that "...the heart of the abuses of Chain Broadcasting is the network-outlet contract."[4/] To curb those demonstrated abuses, the Commission adopted various rules restricting radio networks in their relationships with affiliates, including the Right to Reject Rule, the Time Option Rule, the Dual Network Rule and the Exclusive Affiliation Rule [collectively, the "Four Network Rules"[5/]]. Those rules were subsequently applied to television.[6/]

2/ The five rules under consideration are (1) the "Right to Reject Rule," 47 C.F.R. § 73.658(e); (2) the "Time Option Rule," 47 C.F.R. § 73.658(d); (3) the "Exclusive Affiliation Rule," 47 C.F.R. § 73.658(a); (4) the "Dual Network Rule," 47 C.F.R. § 73.658(g); and (5) the "Network Territorial Exclusivity Rule," 47 C.F.R. § 73.658(b).

3/ Report on Chain Broadcasting, Commission Order No. 37, Docket 5060 (May, 1941) ["Chain Broadcasting Report"], modified, Supplemental report on Chain Broadcasting (1941), appeal dismissed sub nom., National Broadcasting Co. v. United States, 47 F. Supp. 940 (1942), aff'd, 319 U.S. 190 (1943) ["NBC"].

4/ Chain Broadcasting Report at 34.

5/ As the Notice recognizes, the Network Territorial Exclusivity Rule differs from the other Four Network Rules in that it was not designed to restrict networks' control over their affiliates. As discussed herein, the Joint Parties support modification of the Network Territorial Exclusivity Rule as necessary to affiliates' local competitive abilities.

6/ See Network Broadcasting, Report of the Network Study Staff to the Network Study Committee (Oct. 1957), reprinted in Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Cong., 2d Sess. (1958) ["Barrow Report"]; Findings of the Commission, 18 RR 1809 (1959); Second Report and Order, 34 FCC 1103 (1963); Report and Order, 12 RR 1537 (1955). For detailed analysis and history of the rules, see, e.g., Network Inquiry Special Staff, An Analysis of the Network-Affiliate Relationship in Television II-5-35 (October 1979); Network Inquiry Special Staff, FCC Rules Governing Commercial Television

(continued...)

Although the Commission ultimately deleted virtually all of its radio network rules,[7] and despite repeated studies of and inquiries into the continued need for regulation of the network-affiliate relationship in television, the Four Network Rules have remained in place. The reason they have done so -- and should continue in effect -- is that the public interest demands them.

The Four Network Rules were precipitated by the networks' tremendous negotiating leverage in dealing with their affiliates and by affiliation contract provisions which reflected that leverage. The Commission concluded that such provisions conflicted with the public interest because they interfered with (even if they did not absolutely prevent) licensee discretion in conducting their business and in selecting and scheduling programming. Television networks' leverage over their affiliates remains unchanged, as does the paramount importance of maintaining licensee discretion over station programming and operations. The Four Network Rules must, in short, remain in place.

Changes in the Telecommunications Marketplace Do Not Alter the Continuing Public Interest Need For the Four Network Rules

The Notice proposes to eliminate or substantially modify the Four Network Rules, based apparently on the belief that the undisputed changes in the telecommunications marketplace have so damaged the networks' competitive position that the rules are no longer necessary. But

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6/ (...continued)
Network Practices (October 1979); Network Inquiry Special Staff, An Analysis of Television Program Production, Acquisition and Distribution 4, 462-555, Appendix B (June, 1980).

7/ Review of Commission Rules and Regulatory Policies Concerning Network Broadcasting by Standard (AM) and FM Broadcast Stations, Report, Statement of Policy, and Order, Docket No. 20721, 63 FCC 2d 674 (1977).

changes in the video marketplace have affected affiliates as well as networks, and for affiliates, the impact has been to make network affiliation even more critical to their continued ability to maximize local free over-the-air broadcast service.

Networks may have to compete with new video distribution services for programming and audience, but local stations face even more significant competition from local cable systems and burgeoning DBS services, not to mention radio stations, VCR's and other entertainment media. This intense local competition makes network affiliation a critical factor in a station's ability to optimize local programming service. The Commission observed in 1959 that "[w]hile it is true as a general proposition that networks need affiliated stations to provide nationwide coverage, the individual television station has a greater need, in most cases, for the network affiliation."[8] Local stations' need for a network affiliation has not changed. As a consequence, networks have demanded, and affiliates have acceded to, network contract provisions which stretch (if they do not actually exceed) the network rules' current regulatory limits.

For example, a typical Fox network contract includes a provision obligating the affiliate to broadcast all Fox network programs at times to be determined by Fox (or at substitute, Fox-designated make-good times), subject only to limited rights to reject network programs in extraordinary, carefully circumscribed circumstances. More particularly, the affiliate must agree to broadcast Fox programming in specified Programmed Time Periods, except to the extent that the station is actually broadcasting other programming. This exception does not apply to

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8/ Amendment of Section 3.658 of the Commission's Rules and Regulations to Prohibit Television Stations, Other than Those Licensed to an Organization Which Operates a Television Network, from Being Represented in National Spot Sales by an Organization Which also Operates a Television Network, Report and Order, 27 FCC 697, 710 (1959).

extensions or renewals of existing contract obligations, including those which are the result of the station's exercising an option. In other words, the station is precluded from contracting for new programming to air in the time periods Fox has in effect reserved for designated Fox network programs or from renewing existing program contracts, a restriction whose effect in practice is indistinguishable from prohibited time optioning.

NBC contracts, similarly, obligate affiliates to carry all network programs and limit the amount of permissible preemptions. Stations are required to represent their belief that this prior restraint is consistent with the right to reject programs under FCC rules.

Another typical Fox contract provision expressly reserves the late night period from 11 p.m. to midnight, requiring the station to carry Fox programming "upon Fox's election" to lift its current suspension of programming in that time period. A similar provision accords Fox the right to designate "New Programmed Time Periods" during which the station will be obligated in the future to broadcast more Fox network programming. If the station has entered into any agreements for the broadcast of trade or barter programs in such time periods, the licensee is prohibited from renewing or extending those contracts. NBC affiliates may also be required to promise to clear particular programs upon the expiration of other programming commitments (which may not be renewed). Again, these provisions involve what is clearly time optioning.

Other provisions require the station (on notice from Fox or NBC) to reschedule and broadcast programming which is preempted "for any reason." There is no exception for preemptions due to a licensee's conclusion that a program is "unsatisfactory or unsuitable or contrary to the public interest."

The Fox contract also provides that the network "shall" determine the "number and length of the commercial announcements that Licensee may include in Fox Programming," as well as "[t]he placement, timing and format of...Licensee's commercial announcements." [Emphasis added]. Fox also gains additional control over a station's commercial practices by reserving the right unilaterally to determine that a station is performing below average and thereafter to require it to use its own local commercial inventory to broadcast Fox promotional announcements in non-network time periods. Fox also claims the right to determine the number and scheduling of its promotional announcements.

The Fox contract defines "Approved Preemptions" as those caused by force majeure, those required by existing programming obligations (if they are made good) and any preemptions permitted under the contract. (See discussion infra). Any other preemption is deemed to be an "Unauthorized Preemption," and if the licensee makes three or more such preemptions within any 12-month period, Fox has the right, among other remedies, to terminate the affiliation agreement. Significantly, Fox has that right even if it concludes "...that such Unauthorized Preemptions will occur," whether or not they actually occur.

The Fox contract does attempt to comply with the Right to Reject rule by permitting the licensee to preempt or reject "Fox programs which the Licensee reasonably believes to be unsatisfactory, unsuitable or contrary to the public interest" and to substitute "...a program which, in Licensee's opinion, is of greater local or national importance..." However, the station must give Fox notice of an intended preemption, together with the written "justification" therefore. Moreover, the contract severely circumscribes the circumstances in which programming may be considered unsatisfactory or unsuitable, and requires the licensee to state in advance that it does not foresee any need to preempt Fox programming except to permit certain specified programming. NBC contracts also limit the circumstances in which programming may be preempted without penalty and require the affiliate to justify preemptions.

Fox contracts give the network the right to terminate the agreement if the Station changes its "transmitter location, power, frequency, programming format or hours of operation" so that the station "is of less value to Fox as a broadcaster of Fox programming..." [Emphasis added]. Value to Fox as a broadcaster of Fox programming is an undefined term.[9/]

ABC contracts, similarly, specify permissible levels of preemption and penalize affiliates which exceed those levels. Provisions also permit the network to terminate the agreement if the affiliate enters into an LMA with respect to its non-network programming, clearly an intrusion into the station's programming prerogatives.

These are not provisions imposed by networks which are at the mercy of their affiliates. Rather, they reflect the networks' continuing ability to control significant details of their affiliates' operations.[10/] They are, in short, precisely the type of restrictive provisions which

9/ Fox may also terminate the agreement if it acquires any "significant" (an undefined term) ownership interest in another market television station.

10/ Other provisions of current network contracts stretch the limits of other network rules. Fox contracts, for example, give Fox the right, after authorization by the Board of Governors of the Fox Broadcasting Company Affiliates' Association [the "Board"], to administer the sale of affiliates' commercial time. Fox is to receive a 15% commission on such sales. In other words, Fox is to rep its affiliates with respect to the sale of national advertising and is to receive the same 15% commission national reps usually receive for such activities. Compare 47 C.F.R. § 73.658(i).

prompted adoption of the Four Network Rules. The need for those rules to protect affiliates' operational independence remains unchanged.[11/]

Indeed, given the other existing and potential regulatory and legislative changes, the Four Network Rules in general, and the Right to Reject Rule in particular, will play an even more significant role in preserving affiliate independence. The Commission's recent elimination of the Syndicated and Financial Interest Rule[12/] and of the Prime Time Access Rule[13/] will increase networks' presence in the programming markets and the amount of time within which they are able to program affiliates' stations.[14/] Proposed modification of the Network Rep Rule[15/] would give the networks the ability to force their affiliates to accept them as their reps, while any changes in the rule which currently prohibits networks from controlling their affiliates'

11/ Network attempts to portray themselves as victims of the telecommunications revolution are, simply, incredible, given their substantial financial success. See, e.g., "ABC takes top network profit honors," Broadcasting & Cable, (April 3, 1995) at 8.

12/ Review of the Syndication and Financial Interest Rules, §§ 73.659 -73.663 of the Commission's Rules, Second Report and Order, MM Docket No. 90-162, 8 FCC Rcd 3282 (1993), recon. granted in part, Memorandum Opinion and Order, 8 FCC Rcd 8270, aff'd sub nom., Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994); see also, Notice of Proposed Rule Making, MM Docket No. 95-39, FCC 95-144 (April 5, 1995).

13/ Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, Report and Order, MM Docket No. 94-123 (July 31, 1995).

14/ Indeed, NBC has already indicated that it will drop an independently-produced program in order to air one of its in-house productions. "NBC Will Drop Time Warner TV Show," The Wall Street Journal (August 25, 1995) B11.

15/ 47 C.F.R. § 73.658(i).

advertising rates[16] would give networks the even more devastating ability to control affiliates' pricing -- and thus income.

Pending legislation could enhance networks' power to an even greater extent. Both the House and Senate telecommunications bills would increase the number of stations which networks may own by allowing any single entity to own stations that reach as much as 35% of the nation's television audience.[17] The House bill would allow networks to both merge with and acquire cable systems.

Recent and proposed regulatory and legislative changes have acted and will act to increase affiliates' dependence on networks and the networks' ability to exploit that dependence. Adopting the changes proposed in the Notice would make this bad situation worse.

The Right to Reject Rule Must be Retained In its Current Form

The Chain Broadcasting Report emphasized the paramount importance of unfettered licensee control over station operations and programming. The Commission thus stated:

> It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the networks or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that

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16/ 47 C.F.R. § 73.658(h).

17/ See S. Res. 652, H.R. Res. 1555, 104th Cong., 1st Sess. (1995). The Commission is also considering modifications in its television ownership regulations which, if adopted, would have a similar impact in increasing networks' power. Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rulemaking, MM Docket No. 91-221 (Jan. 17 1995).

> he has a better program. The licensee is obliged to preserve to himself the final decision as to what programs will best serve the public interest.[18/]

It was this concern -- that networks not abrogate licensees' individual responsibility for programming in response to community needs -- that prompted adoption of the Right to Reject Rule.

In affirming the network rules, the Supreme Court endorsed the Commission's emphasis on licensee programming discretion:

> The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in any case where he cannot sustain the burden of proof that he has a better program. The licensee is obligated to reserve to himself the final decision as to what programs best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than on his own reasonable decision that the programs are satisfactory...If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest.[19/]

The critical importance of unshackled licensee control over station programming and operations has remained unchanged for the next four decades. For example, almost twenty years later, the Commission reiterated that

> ...the primary consideration here is the responsibility of the individual television station licensee for programming on his station. To discharge that responsibility the licensee must be free to exercise his judgment concerning what programs will best serve the interests and needs of the public in his own community. When, in the licensee's judgment, there is a program which would be of more importance to the public in his

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18/ Chain Broadcasting Report at 66.

19/ NBC, supra, 319 U.S. at 205-206, 218.

> community than a network program either offered or contracted for, he should be free to implement his judgment.[20]

Individual Commission decisions echo this requirement that licensees be free to make programming and scheduling decisions.

For example, in Bob Jones University, Inc., FCC 71-1279 (December 15, 1971), the Commission found that provisions of a statement of policy which required the licensee to schedule programming at a particular time and required advance consultation with a community group concerning preemption decisions appeared to "...improperly curtail the licensees flexibility and discretion in the matters of programming and program scheduling..."[21] Similarly, in Frank Lloyd, FCC 75-1028, 34 RR 2d 1521, 1523 (1975), recons. denied, 36 RR 2d 604 (1976), the Commission stated

> ...the ultimate responsibility with respect to programming and station operation rests upon the individual licensee. This duty cannot be delegated and a licensee cannot, even unilaterally, foreclose its discretion and continuous responsibility to determine the public interest and operate in accordance with that determination.

The Commission thus found unacceptable provisions of an agreement with a citizens' group which bound the licensee to particular programming provisions. Significantly, it did so notwithstanding a provision of the agreement which called for its interpretation in a manner consistent with the Communications Act of 1934, as amended, and the FCC's rules.

20/ Report and Order, Docket No. 12859, 20 RR 1568, 1585 (1960).

21/ See also, e.g., Cipriano Griego, Esq., FCC 75-1172 (October 21, 1975) [rejecting language which binds the licensee to compulsory and binding arbitration because it "...improperly infringes upon the licensee's responsibility and exercise of discretion in its operation"]; Golden West Broadcasters, 8 FCC 2d 987 (1967) ["[p]rivate agreements cannot be construed to limit a broadcaster's responsibility and obligations imposed by the Communications Act."]; Cosmopolitan Broadcasting Corp. v. FCC, 581 F.2d 917 (D.C. Cir. 1978).

The Commission's decision adopting rules concerning licensees' agreements with citizens' groups again emphasized that responsibility for station operations may not be delegated.[22] The rules and policies adopted thereby reflected the Commission's finding "...that some agreements attempt to yield licensee control to essentially private interests, contrary to the scheme of the Communications Act, which requires that the licensee alone must assume responsibility for ensuring that its station operates in the public interest."[23] The Commission noted that it had "...uniformly rejected agreements which would operate to restrict the right of a licensee to make and implement decisions respecting station operations,"[24] and adopted rules and policies designed to preserve licensees' operational responsibility.

The Commission's proposed modification of the Right to Reject Rule suggests an abrupt departure from these years of unbroken precedent:[25] although the rule would be retained, it would be eviscerated by exempting economic preemptions (an undefined term) from its scope. Significantly, however, nothing in the rule's history suggests that its limitation to economic preemptions would serve its purpose. To the contrary, it is patently obvious that it was intended to provide full programming discretion for licensees.

22/ Agreements Between Broadcast Licensees and the Public, Docket No. 20495, Report and Order, 35 RR 2d 1177 (1975).

23/ Id. at 1178.

24/ Id. at 1184.

25/ At least one court has specifically recognized that it is desirable for networks and affiliates to be independent of each other. Sunbeam Television Corp. v. FCC, 243 F.2d 26 (D.C. Cir. 1957).

The principal concern of the Chain Broadcasting rules was to prevent NBC and CBS from contractually binding their affiliates to provisions that were destructive of program competition and restricted the flow of alternative (not simply public service) programs from producers to listeners. In 1941, NBC and CBS felt threatened by their affiliates' broadcast of programs from the Mutual Broadcasting System. NBC and CBS responded by modifying their affiliation agreements to, among other changes, lengthen their terms (from one to five years); require exclusive affiliation; and require affiliates, as a condition of affiliation, to accept provisions that restricted them from rejecting NBC or CBS programs and substituting programs available from the Mutual network.

The Commission found that the purpose and effect of these modifications was to prevent NBC and CBS affiliates from broadcasting the programs of other networks,[26/] that is, to prevent them from presenting programming from other sources. The networks' use of exclusive affiliation provisions was particularly offensive to the FCC "because the public is deprived of the opportunity to hear Mutual programs" Id. at 52.

In order to make it clear that more than public affairs or local news prompted its concern, the Commission noted Mutual's rights to broadcast the 1939 World Series as "[a] concrete example of the manner in which exclusivity clauses operate against the public interest..."Id. When Mutual attempted to broadcast the Series in markets where it had no affiliates, NBC and

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26/ "NBC...did not adopt its exclusivity clause until 1936, after certain of its affiliates had begun to broadcast Mutual programs." Id. at 51; "...the purpose of the [NBC] 5-year term is to prevent the affiliates from becoming affiliated with another national network." Id. at 59.

CBS invoked provisions of their contracts that denied their affiliates the right to substitute the World Series for NBC programs. The Commission concluded that:

> This prevented certain licensees from accepting a program for which they believed there was a public demand and which they thought would be in the public interest. It also...prevented the licensee from receiving income which would have been obtained from acceptance of the program series. As a result, thousands of potential listeners failed to hear the World Series of 1939.

It could not be clearer that affiliate substitution of the World Series for NBC programs was the substitution of one entertainment program for another, in other words, an economic preemption. If the Right to Reject Rule were only intended to reach non-entertainment of programming, the Commission would not have relied on the World Series substitution in adopting its rules.

The Chain Broadcasting Rules plainly were intended to prohibit network use of contractual provisions to restrain affiliates from rejecting network programs in order to substitute other programs which are more attractive because of program performance, ratings, advertiser reaction or profitability. The Commission expressly found that the public interest would be disserved if an affiliate were hindered by network contract provisions from substituting one entertainment program (such as the World Series) for another entertainment program.

The Commission reinforced this conclusion when it criticized a liquidated damages provision in NBC's standard affiliation contract that required an affiliate to pay NBC whatever increased revenue it received from such program substitution because it "...effectively removes all monetary incentive to substitute a local commercial for network commercial programs."Id. at 38. The Commission understood very well that an affiliate might preempt network programs to broadcast alternative programs which the station believes are more attractive or more profitable.

In sum, the Right to Reject rule was not limited in scope to preserving a licensee's ability to air public service programming instead of network programming. Rather, it was intended to preserve the licensee's right to substitute any type of programming for network offerings.

There is no reason in current market conditions to change the focus of the Right to Reject Rule. The requirement that Licensees retain full control over programming and operations remains unchanged.[27] Licensees' programming discretion extends to making programming decisions on economic as well as public service grounds.[28] Unless the Commission is prepared to conclude that licensees may contract away their responsibilities to operate their stations, it must retain the Right to Reject Rule in unchanged form. That any modification will result in the networks' superseding local licensees' programming decisions cannot be doubted: the network contract provisions discussed above which are now demanded by networks already push the envelope of permissible restrictions.

For example, network contract provisions which limit the amount of preemptions which may occur without penalty and which require affiliates to represent that it can "foresee" no need to substitute programming other than specified non-entertainment programming are inconsistent

27/ This is evident, for example, in Commission decisions reviewing local marketing agreements ("LMA's) and allegations of unauthorized transfers of control, see, e.g., Letter to Piney Creek Broadcasting Corporation (February 7, 1995); Letter to William L. Silva, Esq., DA 94-1179 (October 27, 1994); Roy R. Russo, Esq., 5 FCC Rcd 7586 (1990).

28/ For example, the Commission's policies concerning local marketing agreements require licensees of brokered stations to retain control over all programming decisions, not just decisions concerning public service programming. See, e.g., Gisela Huberman, Esquire, 6 FCC 2d 5397 (MMB 1991); Roy Russo, Esquire, 5 FCC Rcd 7586 (MMB 1990).

with unfettered licensee discretion.[29] Such an advance commitment cannot be reconciled with the station's ultimate responsibility for the content of each individual program it airs. The need for or even desirability of preemptions is inherently unpredictable. It is a clear limitation on the exercise of a licensee's public interest obligation to foreclose the substitution of programs where a station's program supplier may provide programs which are poorly conceived, badly produced or unpopular among viewers.

Similarly, a requirement that an affiliate justify preemptions likewise cannot be reconciled with the Commission's rules. One of the Commission's principal concerns in adopting these rules was the practice of both NBC and CBS of including in their affiliation agreements a requirement that affiliates justify their rejection or preemption of network programs. At a hearing that supplied the evidentiary basis for the Chain Broadcasting rules, NBC's Vice President in charge of station relations testified that, if an affiliate substituted another program for an NBC program, the network would "insist" that the affiliate "support his contention that what he has done has been more in the public interest had he carried on [sic] the network program."[30] The Commission found this justification requirement to be inconsistent with the public interest:

> If...the licensee is not allowed to reject a program unless he can provide to the satisfaction of the network that he can obtain a better program, his efforts to exercise real selection among network programs become futile gestures, and he soon proceeds to broadcast network programs as a matter of course....[A licensee] cannot lawfully bind himself to

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29/ The extent of networks' power over their affiliates is emphasized by the Fox network contract provision which gives Fox the right to terminate if it concludes that unauthorized preemptions may occur.

30/ Id. at 38.

accept programs in every case where he cannot sustain the burden of proof that he has a better program.[31/]

Current network contract provisions requiring an affiliate to provide written justification for preemption decisions are precisely the type of restraints which prompted the right to reject rule. They directly and unambiguously violate that rule.

A similar intrusion on licensees' discretion is found in ABC's attempt to obtain provisions in affiliation contracts which permit the network to terminate affiliation in the event that a station enters into an LMA affecting its non-network programming. This restriction clearly conflicts with longstanding rules and policies. It requires the affiliate to relinquish a significant programming decision to ABC. ABC would in effect control the affiliate's ability to enter into an LMA, using the threat of loss of ABC affiliation as a means of precluding that choice by the licensee. In other words, the provision gives ABC practical control over programming and scheduling decisions which are rightfully (and legally) the responsibility of the licensee.

Provisions in contemporary network contracts already require affiliates to relinquish substantial programming and scheduling control to the networks and reserve to networks the right to make programming and scheduling decisions which are rightfully (and legally) the responsibility of the licensee.[32/] They require affiliates to commit -- in advance of broadcast -

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31/ Id. at 66.

32/ It should be noted that although one individual provision might arguably pass regulatory muster, the impact of all proposed provisions taken together heightens their restrictive impact to a level which is clearly inconsistent with regulatory requirements. Interestingly, when it adopted the Chain Broadcasting Report, the Commission was well aware that certain network contract provisions could be more restrictive when considered cumulatively than on an individual basis: "At every turn, in short, restrictive clauses taken cumulatively operate with even greater force

(continued...)

- that they will preempt no more than a predetermined amount of programming or face possible termination of the agreement. They require affiliates to specify -- in advance of broadcast -- the particular circumstances in which programming will be considered unsatisfactory, unsuitable or contrary to the public interest, even though there may well be other reasons why a station would choose not to broadcast a network program. They are, in short, precisely the sort of Draconian contract provisions which initially prompted the Chain Broadcasting Rules.

Networks are able to extract these provisions from their affiliates with the Right to Reject Rule in place. Obviously, if that rule is weakened as proposed in the Notice, the networks' ability to further control affiliates' programming and operational decisions will be enhanced -- and exercised. The Right to Reject Rule must be strengthened, not eviscerated, in this proceeding.

The Time Option Rule Must Be Retained Without Changes

The Notice proposes to modify the Time Option Rule to permit networks to option time so long as appropriate notice is given. This modification would reduce the prohibition to a

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32/ (...continued)
than their effect considered in isolation would suggest." Chain Broadcasting Report at 76 - 77. This is certainly the case with the Fox contract, which, in addition to restricting licensees' programming and scheduling discretion, contains a number of other provisions which extend Fox's leverage over its affiliates and make it difficult for them to operate in a manner completely independent of the network's control and influence. For example, the contract requires the affiliate to adopt a promotional schedule consistent with Fox's recommendations and to adopt an advertising budget which will permit the station to participate in Fox's co-op advertising plan. Another provision permits Fox to terminate the network contract if there is any material change in the station's technical facilities or format which makes it "of less value to Fox" (an undefined term) as an affiliate. Affiliates must thus think twice before making any changes in their facilities or their non-network programming: although I believe this change is necessary and appropriate to my operations as a station, will Fox agree? Or will I lose my affiliation?

mockery, representing yet a further opportunity for networks to intrude on licensees' independence in operating their stations.

As the Notice recognizes, the Time Option Rule was intended to facilitate the development of new networks and to preserve licensees' programming discretion. The Notice, however, suggests that the rule may benefit new networks by enabling them to develop a network program schedule. That suggestion, however, overlooks the fact that if existing networks exploit time optioning, a new network will not have any time available to option. The Time Option Rule in its present form is useful for new networks. To add a notice provision would destroy this function.

More significant than its role in fostering new networks is the Time Option Rule's role in preserving licensee discretion. It was this role which the Chain Broadcasting Report stressed:

> A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.
>
> We conclude that national network time options have restricted the freedom of station licensees and hampered their efforts to broadcast local commercial programs, the programs of other national networks, and national spot transcriptions.

Chain Broadcasting Report at 65.

Adding a notice provision to the Time Option Rule would not change time optioning's restriction on licensee programming discretion: it would simply alter the time period over which that restriction is imposed. The Time Option Rule must be retained in its present form.[33]

The Exclusive Affiliation Rule Should be Retained

The Notice proposes to eliminate Section 73.658(a)'s prohibition on exclusive network affiliation, at least in larger markets. Such action would merely add to the networks' increasing leverage over their affiliates.[34]

Networks are currently requiring stations to enter into affiliation agreements having terms far in excess of five year license terms.[35] If these long term contracts are permitted to be exclusive, the networks' existing dominance over their affiliates will become even stronger.[36] The prohibition on exclusive affiliation should be retained.

33/ As discussed above, existing network provisions already approach (if they do not actually involve) time optioning in that networks are reserving rights to program future time periods and are restricting affiliates in their ability to continue commitments for non-network programs broadcast in time periods which the network wishes to use.

34/ Amazingly, the Notice suggests that affiliates can use the Right to Reject Rule in combination with exclusive affiliation to build an audience for programming it finds more profitable, at the network's expense. Not only is there no evidence of this extraordinary phenomenon, the Commission's concern is patently inconsistent with its longstanding position that its function is not to establish stations' (and presumably also networks') success. See, e.g., Triangle Publications, Inc., 29 FCC 315 (1960), aff'd sub nom., Triangle Publications, Inc. v. FCC, 291 F.2d 342 (D.C. Cir. 1962); PZ Entertainment Partnership, L.P., 68 RR 2d 1446 (1991), recons. denied, 70 RR 2d 1504 (1992).

35/ The Chain Broadcasting Report described in detail the anticompetitive impact of long-term affiliation contracts. See, e.g., Chain Broadcasting Report at 59 et seq. The Report's reasoning in this regard remains valid today.

36/ The provision in ABC contracts seeking to prohibit affiliates from entering into LMA's without the network's consent seeks a form of exclusive affiliation in that ABC would prohibit its affiliate from obtaining programming from another station, if not another network.

The Dual Network Rule Should be Retained

The Commission proposes to eliminate the dual network rule. Such action would enable networks to substantially expand their operations on a nationwide basis, thereby proportionately enhancing their power and influence. Permitting merger of existing networks -- rather than their mere expansion -- would have a devastating impact not only upon nationwide competition but also on competition within local markets. The Commission currently prohibits common ownership of two television stations whose Grade B contours overlap. 47 C.F.R. § 73.3555(b). It should not, and cannot logically, permit two stations in the same market to affiliate with commonly-owned networks which provide a substantial portion of each station's programming.

When combined with the possible increase in station ownership limits and existing and proposed changes in other network rules, elimination of the dual network rule would pave the way for extensive expansion of the existing major networks. It would also erect potentially insurmountable barriers to new networks' entry. The present rule must stay in place.

The Network Territorial Exclusivity Rule Should be Revised to Reflect Market Realities

The Network Territorial Exclusivity Rule extends affiliates exclusivity rights only within their communities of license. The Notice proposes to eliminate the first prong of the rule (which relates to network programs not taken by the local affiliate) and to modify its second prong (which relates to all network programs) by expanding the geographic area to which it relates. The Joint Parties support these changes.

The law has long recognized the validity of reasonable restrictions designed to preserve the value of purchased property within the purchaser's market area, such as territorial exclusivity